North Dakota Law Review

Volume 73 | Number 2 Article 6

1997

Waters and Water Courses - Game: What Does the Future Hold for Eleven Thousand Federal Wetland Easements in North Dakota

Paul D. Odegaard

WATERS AND WATER COURSES—GAME: WHAT DOES THE FUTURE HOLD FOR ELEVEN THOUSAND FEDERAL WETLAND EASEMENTS IN NORTH DAKOTA?

United States v. Johansen, 93 F.3d 459 (8th Cir. 1996)

I. FACTS

Kerry Johansen and Michael Johansen (Johansens) own farmland in Steele County, North Dakota.[1] In the 1960s, the United States Fish and Wildlife Service (FWS) purchased federal wetland easements from the Johansens' predecessors.[2] These easements are located on farmland tracts currently farmed by the Johansens.[3] The FWS purchased wetland easements on approximately 1,033 acres of the Johansens' land.[4] Specifically, the FWS purchased easements for farmland tracts 21X (a half section), 24X (a half section), and 30X (a half section plus eighty acres).[5] Prior to 1976, the FWS standard easement document delineated

1. Appellants' Brief at 1, United States v. Johansen, 93 F.3d 459 (8th Cir. 1996) (No. 95-3996ND).

2. United States v. Johansen, 93 F.3d 459, 460 (8th Cir. 1996). The easement conveyance was made subject to the standardized terms then used by the FWS for most wetland easement acquisitions. *Id.* at 461. According to standard FWS practice at the time, the Johansens' easement documents contained a legal description of the *entire tract of land*, i.e., quarter section, half section, or section. *Id.* The remainder of the easement document used by the FWS in this case stated in relevant part:

> The parties of the first part, for themselves and for their heirs, successors and assigns, covenant and agree that they will cooperate in the maintenance of the aforesaid lands as a waterfowl production area by not draining or permitting the draining, through the transfer of appurtenant water rights or otherwise, of any surface water including lakes, ponds, marshes, sloughs, swales, swamps, or potholes, *now existing or reoccurring due to natural causes* on the above-described tract, by ditching or any other means; by not filling in with earth or any other material or leveling, any part or portion of the above-described tract on which surface water or marsh vegetation is now existing or hereafter reoccurs due to natural causes; and by not burning any areas covered with marsh vegetation. It is understood and agreed that this indenture imposes no other obligations or restrictions upon the parties of the first part and that neither they nor their successors, assigns, lessees, or any other person or party claiming under them shall in any way be restricted from carrying on farming practices such as grazing, hay cutting, plowing, working and cropping wetlands when the same are dry of natural causes, and that they may utilize all of the subject lands in the customary manner except for the draining, filling, leveling, and burning provisions mentioned above.

Appellants' Brief at app. 6, *Johansen* (No. 95-3996ND) (emphasis added). Considerable comment has been made about the "now existing or reoccurring due to natural causes" language in these pre-1976 easements. One might ask, reoccurring from what point in time? Although the court in *Johansen* did not directly address this question, a valid argument can be made that "reoccurring" can logically be read to mean "whenever" occurring if at any point in time the land was susceptible to becoming a wetland. Arguably, it would have to mean "whenever" occurring or otherwise "now existing" would be superfluous. If such a reading of this easement is accepted, the *Johansen* court's revised interpretation of the scope of pre-1976 federal wetland easements is unnecessary.

3. *Johansen*, 93 F.3d at 460.

4. *Id.* at 461.

5. *Id.* The Johansens' predecessors were paid $600 for each of the easements purchased on tracts 21X and 24X, and $700 for tract 30X. *Id.*

the entire tract of land in its legal description.[6] However, for each of the recorded easement conveyances, the FWS prepared an administrative Easement Summary.[7] These summaries, though not a part of the easement document itself, provided information such as tract description, tract acreage, wetlands acreage, and cost per wetland acre.[8] Thus, while the easement document itself described the easements as encumbering the entire tract of land, the corresponding Easement Summaries actually represented that the FWS purchased 101 acres of wetland for the three tracts in question.[9]

The spring of 1995 was the second consecutive wet spring in Steele County.[10] As a result, the Johansens were having difficulty farming their land due to excessive surface and subsurface water.[11] In January, 1995, Kerry Johansen requested that the FWS inform him what water he could drain so he could resume normal farming practices.[12] While claiming to be sympathetic to the Johansens' plight, the FWS nonetheless responded that any wetlands developed during wet years still remained subject to easement restrictions.[13] The FWS maintained that only in the event that the Johansen's farmstead or roads became endangered could they drain any water off the encumbered tracts.[14] Notwithstanding the FWS'

6. *Id.* at 462.

7. *Id.*

8. *Id.*

9. *Id.* at 461-62; *see also* Murray G. Sagsveen, *Waterfowl Production Areas: A State Perspective*, 60 N.D. L. REV. 659, 684-85 (1984) (discussing the negotiation and transaction process between the FWS and landowner). Sagsveen gave the following explanation of what role the Easement Summaries played in the negotiation process:

> [After a landowner offers to sell a wetland easement], the FWS will assess the value of the tract for migratory waterfowl and will *calculate the number of wetland acres on the tract*. The FWS then prepares an 'easement summary,' which contains the legal description of the tract . . . *the wetland acreage, the total acreage of the tract*, the wetland cost per acre, and other data.

Id. (footnotes omitted) (emphasis added). In the Johansens' case, the easement conveyance documents described the easements as encumbering the entire tract of land, while the accompanying Easement Summaries represented that the FWS purchased 33, 33, and 35 acres of wetland, respectively, on each of the tracts in question. *Johansen*, 93 F.3d at 462. In fact, the FWS publishes annual reports in which it still maintains that it controls 33 acres on tract 21X, 33 acres on tract 24X, and 35 acres of wetlands on tract 30X. *Id.* In contrast, easements negotiated after 1976 did contain maps locating the particular wetlands subject to the easements terms. *Id.* at 463. That is, for post-1976 easement agreements, the FWS produces a map that is recorded as part of the easement document. This map essentially puts the landowner on notice as to the location of the covered wetland acreage not subject to drainage.

10. *Johansen*, 93 F.3d at 462.

11. *Id.* Because of two unusually wet years in Steele County, the water table had risen and wetlands that had usually dried up over the summer either had remained full or at least remained wet much longer than usual. Brief of Appellee at 1, *Johansen* (No. 95-3996ND). Some of the Johansens' farmland could not even support farm machinery due to excessive moisture. *Johansen*, 93 F.3d at 462.

12. *Johansen*, 93 F.3d at 462 (citing Letter from Kerry Johansen to Hoistad (Jan. 1, 1995) (Ex. D-120)).

13. *Johansen*, 93 F.3d at 462.

14. *Id.* The responding letter from the FWS stated in relevant part:

> [Y]our area has been hard hit in the last two years . . . . This particular tract of land has

position, the Johansens dug ditches on portions of the three tracts to drain the excess water.[15] As a result, the United States brought misdemeanor charges against the Johansens for unauthorized draining of federal wetlands, a violation of 16 U.S.C. § 668dd.[16]

As part of their defense, the Johansens sought to present evidence that in spite of their ditching activities, the wetland acreage remaining still exceeded the acreage described in the Easement Summaries that had been prepared by the FWS at the time the easements were purchased.[17] In a motion *in limine*, the United States argued that such "acreage limitation defenses" had been rejected by the Eighth Circuit.[18] Relying on *United States v. Vesterso*,[19] the United States District Court for the District of North Dakota ruled that the Johansens' acreage defense was improper and therefore excluded the proffered evidence.[20] The

> a high number of basins on it. This, I'm sure, combined with the high rain amounts has caused you some difficulty farming in the past year . . . . The only provisions of the easement that allow for drainage are when [there] are safety or health concerns involved. Another way of saying this is unless your roads or farmstead is in danger of being flooded, no drainage can take place.

Id. (citing Letter from Hoistad to Kerry Johansen (Mar. 17, 1995) (Ex. D-121)).

15. *Id.* The Johansens alleged that in 1995 there were 83.8, 64.9, and 67.1 acres of wetland on tracts 21X, 24X, 30X, respectively. *Johansen*, 93 F.3d at 462 n.3. However, it should be noted that although the court in *Johansen* seems to have adopted some of the Johansens' factual claims, the district court did not make any findings of fact regarding any of these claims. *Id.*

16. *Id.* Section 668dd(c) provides, in relevant part, that "[n]o person shall knowingly disturb, injure, cut, burn, remove, destroy, or possess any real or personal property of the United States, including natural growth, in any area of the [National Wildlife Refuge] System." 16 U.S.C. § 668dd(c) (1994).

17. *Johansen*, 93 F.3d at 462. The Johansens termed this their "acreage defense." *See* Appellants' Brief at 1-3, *Johansen* (No. 3996ND) (explaining the background and theory behind the "acreage defense"). Specifically, the Johansens explained the "acreage defense" as follows:

> The [Johansens'] acreage defense . . . concedes for purposes of the criminal prosecution against them the reported number of wetlands acreage per tract, as being restricted by the [FWS] easement. However, if, for example, a tract's . . . reported wetlands acreage is 33 acres, and if after the draining activities of a farmer there yet remains *more than* 33 acres of wetlands, then the 'acreage defense' involves proving that more than 33 acres of wetlands remained undrained as a matter of fact, and then arguing to the jury that the United States has exactly what it got in the easement, and that is at least 33 acres of wetlands, undrained and undisturbed by any draining activities of defendants.

Id. at 16 (emphasis original). According to the Johansens, the "reported number of wetlands per tract" consisted of the number of acres which the FWS reported as being subject to federal wetland easement restrictions in the *North Dakota* litigation. *Id.* at 17-20 (citing *North Dakota v. United States*, 460 U.S. 300, 311 (1983)); *see also infra* note 74 (explaining the position taken by the FWS with regard to the number of wetland acres as being applied to gubernatorial consent limits). The FWS' "reported number" of acres subject to easement restrictions came directly from the number of wetland acres as reported in the Easement Summaries. *See infra* note 74.

18. United States v. Johansen, No. C3-95-62, slip op. at 1-2 (D.N.D. Nov. 14, 1995) (order denying defendants' "acreage defense" and related theories).

19. 828 F.2d 1234, 1241-42 (8th Cir. 1987) (holding that a defendant charged with damaging property subject to a federal wetland easement could not defend on the basis that the federal government had not ensured compliance with gubernatorial consent limitations by identifying all wetlands covered by the federal easements).

20. *Johansen*, No. C3-95-62, slip op. at 1-2.

Johansens subsequently entered conditional pleas of guilty, pending the appeal of the district court's evidentiary ruling.[21]

On appeal, the Eighth Circuit Court of Appeals disagreed with the district court's interpretation of *Vesterso* regarding the scope of federal wetland easements.[22] Reviewing the district court's pretrial order *de novo*, the court reversed,[23] *holding* that federal wetland easements are limited to the acreage as specified in the Easement Summaries, and remanded the case for action consistent with the opinion.[24]

This Comment will review the historical development of the federal waterfowl production area program, including the cooperative efforts of North Dakota with the federal government in this program and the eventual dissipation of that relationship. This Comment will then examine case law from the United States Supreme Court and Eighth Circuit Court of Appeals that previously interpreted the scope of federal wetland easements and established the government's burden of proof in wetland easement violation cases. Following the discussion of prior case law, this Comment will review the rationale and holding in *United States v. Johansen*.[25] Finally, this Comment will discuss the potential impact of *Johansen* on this particular federal wetland conservation program, specifically focusing on the United States' ability to enforce over 11,000 federal wetland easements in North Dakota.

II. LEGAL HISTORY

A. HISTORICAL DEVELOPMENT OF THE WATERFOWL PRODUCTION AREA PROGRAM

The nation's obligations to migratory birds first originated nearly eighty years ago when Congress enacted the Migratory Bird Treaty Act (Treaty Act of 1918) in 1918.[26] The Treaty Act of 1918 protected

21. *Johansen*, 93 F.3d at 462.

22. *Id.* at 468. The court in *Johansen* noted that "the district court's decision was predicated on a fundamental (albeit understandable) misinterpretation of this circuit's case law with respect to the scope of federal wetlands easements." *Id.*

23. *Id.*

24. *Id.* at 466, 468. Specifically, the court held:

> [T]he United States' wetland easements acquired title on the acreage specified in the Easement Summaries. . . . [T]he government must . . . prove that the defendant drained the Summary Acreage covered by the federal wetland easement. The converse is also true: a defendant must be permitted to introduce evidence proving that they did not drain the Summary Acreage.

Id. at 468.

25. 93 F.3d 459 (8th Cir. 1996).

26. Migratory Bird Treaty Act, Pub. L. No. 65-186, ch. 128, 40 Stat. 755 (1918) (codified as amended at 16 U.S.C. §§ 703-712 (1994)). Prior to the enactment of the Treaty Act of 1918, virtually no protection existed for migratory birds in the United States. GUY A. BALDASSARRE & ERIC G. BOLEN, WATERFOWL ECOLOGY AND MANAGEMENT 10 (1994). For example, there were no restrictions on bag limits, hunting hours, gun size, or the number of shells a gun could hold, and spring hunting, the use of

migratory birds primarily by regulating the hunting, capture, possession, and sale of migratory birds.[27] It soon became evident, however, that the protections offered by the Treaty Act of 1918 would be only partially successful if crucial habitats were not also targeted to be preserved and managed for migratory birds.[28] Thus, in 1929, Congress enacted the

live decoys, and the sale of harvested ducks were all legal. *Id.* As a result, market hunting flourished in this country around the turn of the century, and was having a drastic impact on the migratory bird population. *Id.* Beginning around 1900, various measures were proposed in Congress intending to curb the effects of such widespread market hunting. *Id.* at 520-22. The early measures largely centered around various hunting regulations for waterfowl. *Id.* These early efforts usually failed, however, because of the prevailing view that hunting regulations remained within the jurisdictional power of the states. *Id.* at 520-21; *see, e.g.*, United States v. Shauver, 214 Fed. 154, 159 (E.D. Ark. 1914) (holding that migratory birds were owned by the states in their sovereign capacity and that this control was one that Congress had no power to displace). The federalism obstacles faced in the courts, and hostility in Congress, led to a shift in strategy by the leaders of the migratory bird preservation efforts. *See* BALDASSARRE, *supra*, at 521. The federalism and jurisdictional disputes began to fade when a resolution was successfully proposed authorizing the President of the United States to initiate international conventions for the protection of migratory birds. *Id.* These conventions established a means for preparing treaties that, if ratified, would likely remove the federalism issue from further constitutional challenges. *Id.* In 1916, officials in Canada and the United States finally produced the Migratory Bird Treaty and President Woodrow Wilson signed the Migratory Bird Treaty on August 18, 1916. *Id.* This treaty opened the door for the Treaty Act of 1918, which regulated the hunting, capture, possession, and sale of migratory birds. *Id.* at 522. The states, however, did not give up without a fight, as the State of Missouri soon led the challenge to federal intervention in the regulation of migratory birds in the seminal case Missouri v. Holland, 252 U.S. 416 (1920). In that case, Missouri sought to enjoin a United States game warden from enforcing federal regulations enacted pursuant to the Treaty Act of 1918 on the grounds that the statute unconstitutionally interfered with rights reserved to the states under the Tenth Amendment. *Id.* at 430. The State bolstered its argument by pointing to an earlier federal statute that regulated the taking of migratory birds, which had not been passed pursuant to an international treaty, and had been held unconstitutional in lower courts on the grounds that the birds were owned by the states in their sovereign capacity and were therefore immune from federal regulation under the Tenth Amendment. *Id.* at 432; *see also* Geer v. Connecticut, 161 U.S. 519 (1896); United States v. Shauver, 214 F. 154 (E.D. Ark. 1914). However, Justice Holmes countered that if the treaty was valid, then there could be no challenge to the validity of the statute under Article I, Section 8, as a "necessary and proper means to execute the powers of the Government." *Holland*, 252 U.S. at 432. Justice Holmes concluded that the treaty was valid primarily because migratory birds did not respect national boundaries and were therefore appropriate subjects for regulation by agreement with other countries. *Id.* at 434-35. Finally, Justice Holmes found that even if the states were capable of effectively regulating migratory birds, nothing in the Constitution prohibited the federal government from acting by means of a treaty to deal with a "national interest of very nearly the first magnitude . . . [that] can be protected only by national action in concert with that of another power." *Id.* at 435.

27. Migratory Bird Treaty Act, sec. 2, 40 Stat. 755 (1918) (codified as amended at 16 U.S.C. §§ 703, 712 (1994)).

28. BALDASSARRE, *supra* note 26, at 524. The alarming rate of destruction of wetland resources in the United States at the turn of the century was fueled by the attitude that wetlands were waste areas in need of being made useful. As Baldassarre and Bolen explained:

> [The trend of wetland destruction] began with the colonization of North America and the quest for productive land, and steadily increased as technology improved and human populations expanded. Wetlands, it seemed, were 'useless' obstacles in the march of civilization toward its vision of 'progress' in fulfillment of the nation's Manifest Destiny.

Id. at 13-14 (citations omitted). Legislation toward that end began with the Swamp Land Acts of 1849, 1850, and 1860, which gave federally owned wetlands back to the states for "reclamation." *Id.* at 456 By the mid-1950s, these programs had transferred nearly half of the nation's original wetlands from federal to state control, most of which ultimately fell into private ownership. *Id.* (citations omitted). The result of this attitude toward wetlands was discussed in a 1976 United States Senate Report, which stated: "There were originally approximately 127 million acres of wetlands in the area which forms the 48 contiguous States. By 1955, this total acreage had been reduced to approximately 74 million

Migratory Bird Conservation Act (Conservation Act),[29] which authorized the Secretary of the Interior to acquire land for use as "inviolate sanctuaries for migratory birds."[30] Notably, the Conservation Act accommodated the federal-state relationship by conditioning state land acquisition on state consent.[31] North Dakota consented to participation in the program in 1931.[32]

In 1934, Congress passed the Migratory Bird Hunting Stamp Act (Stamp Act)[33] to provide the Secretary of Interior with a funding mechanism for the acquisition of migratory bird sanctuaries as required by the Conservation Act.[34] The Stamp Act funded the program via the sale of bird hunting stamps, commonly known as duck stamps.[35] The duck stamp proceeds formed a "migratory bird conservation fund" to be used to purchase and maintain bird sanctuaries.[36]

The federal migratory bird preservation effort subsequently shifted its strategy away from creating large waterfowl sanctuaries toward the preservation of small wetlands on private property.[37] As such, the Stamp Act was amended in 1958 to give the Secretary of the Interior authorization to acquire small marshes, potholes, and sloughs, which

acres of which only 22.5 million acres were significant value in the conservation of migratory waterfowl." S. REP. NO. 94-594, at 1 (1976), *reprinted in* 1976 U.S.C.C.A.N. 271, 272.

29. Migratory Bird Conservation Act, Pub. L. No. 70-770, ch. 257, 45 Stat. 1222 (1929) (codified as amended at 16 U.S.C. §§ 715-715s (1994)). The enactment of the Conservation Act has been characterized as the beginning of a "national thrust for the steady acquisition of waterfowl habitat." BALDASSARRE, *supra* note 26, at 525.

30. Migratory Bird Conservation Act, Pub. L. No. 70-770, ch. 257, sec. 5, 45 Stat. 1223 (1929) (codified as amended at 16 U.S.C. § 715d(2) (1994)). Although § 5 was amended by § 5(a) of the Fish and Wildlife Improvements Act of 1978, Pub. L. 95-616, 92 Stat. 3113, the "sense of the language, however, was not altered." North Dakota v. United States, 460 U.S. 300, 302 (1983) (referring to 16 U.S.C. § 715d (Supp. V 1976)).

31. Migratory Bird Conservation Act, Pub. L. No. 70-770, ch. 257, sec. 7, 45 Stat. at 1223 (1929) (codified as amended at 16 U.S.C. § 715f (1994)). *See* Sagsveen, *supra* note 9 at 660 (characterizing the inclusion of the state's consent as a condition to land acquisition as an "unusual accommodation").

32. Act of Mar. 2, 1931, ch. 207, § 1, 1931 N.D. Laws 360 (codified as amended at N.D. CENT. CODE § 20.1-02-18 (1991)).

33. Migratory Bird Hunting Stamp Act, Pub. L. No. 73-124, ch. 71, 48 Stat. 451 (1934) (codified as amended at 16 U.S.C. §§ 718-718j (1994)).

34. Migratory Bird Hunting Stamp Act, Pub. L. No. 73-124, ch. 71, sec. 4, 48 Stat. 452 (1934) (codified as amended at 16 U.S.C. § 718d(b) (1994)).

35. North Dakota v. United States, 460 U.S. 300, 302 (1983).

36. *Id.*

37. BALDASSARRE, *supra* note 26, at 535. The strategy shifted because not all wetlands were of a size that required protection as a federal refuge. *Id.* Since many small wetlands, even isolated potholes or sloughs, were valuable as waterfowl habitat, an efficient means for acquiring these areas was needed. *Id.* In *United States v. Albrecht*, 496 F.2d 906 (8th Cir. 1974), the court described the characteristics of a prairie pothole region and its value as habitat for waterfowl:

> Each square mile of such land is dotted by approximately 70 to 80 potholes of three to four feet deep. . . . [T]he potholes usually retain water through July or August, and therefore, provide an excellent environment for the production of aquatic invertebrates and aquatic plants, the basic foods for breeding adult ducks and their offspring. Essential to the maintenance of the land as a waterfowl production area is the availability of shallow water in these numerous potholes during the usually drier summer months.

Id. at 908 (citations omitted).

were to be designated as Waterfowl Production Areas.[38] Since waterfowl production areas did not have to be maintained as sanctuaries,[39] there was no need for them to be purchased outright.[40] Therefore, the United States' was vested with the authority to acquire easements that prohibited landowners from draining their wetlands or otherwise destroying the wetlands suitability as migratory breeding grounds.[41]

Shortly after the 1958 amendment, it became evident that revenues from the Conservation Fund could not finance such a massive land acquisition program.[42] Thus, Congress created an additional source of funding via the Wetlands Act of 1961 (Wetlands Loan Act), which authorized an interest-free loan to go into the Migratory Bird Conservation Fund.[43] Significantly, in step with the Conservation Act of 1929, the Wetlands Loan Act accommodated the federal-state relationship by conditioning state land acquisition on the consent of the governor or appropriate State agency.[44]

B. NORTH DAKOTA'S PARTICIPATION IN THE FEDERAL WETLANDS CONSERVATION PROGRAM.

North Dakota initially cooperated with federal efforts to preserve vital migratory bird habitats.[45] In fact, by 1958, the United States had

38. Sagsveen, *supra* note 9, at 660. Specifically, the amendment gave the Secretary of the Interior authorization to purchase a new type of property, "small wetland and pothole areas, interests therein, and rights-of-way to provide access thereto," and these small wetlands or pothole areas were "to be designated as 'Waterfowl Production Areas.'" § 2-3, 72 Stat. 487 (1958) (codified as amended at 16 U.S.C. § 718d(c) (1994)). The Johansens' easements were purchased pursuant to this amendment to the Stamp Act. United States v. Johansen, 93 F.3d 459, 461 (8th Cir. 1996).

39. *See North Dakota*, 460 U.S. at 303 (citing to 16 U.S.C. § 718d(c) (1982) and stating that waterfowl production areas could be "acquired without regard to the limitations and requirements of the Migratory Bird Conservation Act").

40. *Id.*

41. *Id.*

42. Sagsveen, *supra* note 9, at 660. In the years following World War II, the funds derived from the sale of duck stamps could not alone stem the destructive tide of immense wetland losses. BALDASSARRE, *supra* note 26, at 533-34. Congress responded accordingly with the Wetlands Loan Act of 1961. *Id.*

43. Wetlands Loan Act, Pub. L. No. 87-383, secs. 1, 3, 75 Stat. 813 (1961) (codified as amended at 16 U.S.C. § 715k-3, 4 (1994)).

44. Wetlands Loan Act, Pub. L. No. 87-383, sec. 3, 75 Stat. 813 (1961) (codified as amended at 16 U.S.C. 715K-5 (1994)). In *North Dakota*, the United States Supreme Court distinguished the Wetlands Loan Act's enabling provision from the Conservation Act:

> [The Loan Act provides that] no land shall be acquired with moneys from the migratory bird conservation fund unless the acquisition thereof has been approved by the Governor of the State or appropriate State agency. This proviso is in addition to the Conservation Act's requirement in its § 7, that the State "shall have consented by law" to the acquisition of land for inviolate bird sanctuaries. The latter requires consent by the legislature; the former requires consent by the Governor or the "appropriate State agency."

North Dakota, 460 U.S. at 303 n.3 (citations omitted).

45. *See North Dakota*, 460 U.S. at 304 (discussing the relationship between the federal government and North Dakota regarding the federal wetland conservation program); *see also* Amicus Brief of North Dakota at 2, United States v. Johansen, 93 F.3d 459 (8th Cir. 1996) (No. 95-3996ND)

acquired more than 276,000 acres of land in North Dakota for use as waterfowl refuges.[46] Soon after the passage of the Wetlands Loan Act in 1961, the FWS sought the necessary consent from then Governor William L. Guy for further land acquisitions in the State.[47] Between 1961 to 1977, Governors Guy and Arthur A. Link consented to the acquisition of approximately 1.5 million acres of wetland easements.[48] Although the gubernatorial consents specified the maximum wetland acreage that could be acquired within each county, particular tracts of land were not further specified.[49] Since North Dakota wetlands were targeted by the FWS as a national priority,[50] the FWS faced substantial pressure to meet the ambitious goals that they had described to Congress.[51] By 1977, the FWS had purchased 11,685 wetland easements in North Dakota,[52] totaling nearly one-half of the total wetland acreage authorized by the gubernatorial consents.[53]

In the mid-1970s, the cooperation that had marked the joint effort between the FWS and North Dakota began to break down.[54] Although the source of the dispute was not altogether clear,[55] some landowners,[56]

(describing the relationship between North Dakota and the federal government as a partnership that "began amicably").

46. *North Dakota*, 460 U.S. at 305.

47. Sagsveen, *supra* note 9, at 661. Promptly after the passage of the Loan Act, Governor Guy was contacted by FWS officials concerning federal acquisition of waterfowl production areas in North Dakota. *Id.* Initially, Governor Guy consented to the acquisition of easements over 1.2 million acres of wetlands in North Dakota for waterfowl production areas. *Id.*; *see also North Dakota*, 460 U.S. at 305 (discussing generally the State's role at the beginning of the program).

48. *North Dakota*, 460 U.S. at 305.

49. *Id.*

50. *See* Sagsveen, *supra* note 9, at 662 (citing to S. REP. NO. 94-594, at 3 (1976), *reprinted in* 1976 U.S.C.C.A.N. 271, 273). The FWS ranked the prairie pothole states of North Dakota, South Dakota, and Montana (a prime breeding region) as being its top priority among 32 geographical locations in the United States for waterfowl habitat acquisition efforts. *Id.* The concentration by the FWS on this region stemmed from its estimate that this region "continue[d] to be drained at some 35,000 acres annually, a rate at which the [FWS'] acquisition program has slowed by as much as 15,000 to 20,000 acres per year." *Id.* at 14.

51. Sagsveen, *supra* note 9, at 662. The FWS had fallen short of the wetland acquisition goals it had set for itself between 1962 through 1976 by over 600,000 acres. S. REP. NO. 94-594, at 2. Moreover, in 1975, the FWS had revised its acquisition goals and identified an additional 1.3 million acres of prime wetland habitat. *Id.*

52. Amicus Brief of North Dakota at 3, United States v. Johansen, 93 F.3d 459 (8th Cir. 1996) (No. 95-3996ND). In Steele County, the Johansens' home county, Governor Guy authorized the acquisition of 9,618 acres of wetland. *Id.*

53. *North Dakota*, 460 U.S. at 305.

54. *Id.* at 306.

55. *Id.*

56. *See, e.g.*, Werner v. United States Dep't of Interior, 581 F.2d 168, 169 (8th Cir. 1978) (finding that oral representations made to farmers by FWS agents concerning the scope of wetlands easements did not accord with the terms of the written easements); United States v. Schoenborn, CR No. 81-0145, slip op. at 9 (D. Minn. Mar. 26, 1982) (finding that "[t]here was significant evidence at trial to support defendant's contentions that the [FWS] agent . . . made unauthorized oral representations which were inconsistent with the written terms of the easement and map"). Indeed, misrepresentation claims were raised by landowners as a way to recover damages for oral misrepresentations made to them by FWS agents during wetland easement negotiations. *See, e.g.*, *Werner*, 581 F.2d at 171. These claims were generally dismissed, however, because such

and the State of North Dakota maintained that it was caused by certain practices of the FWS.[57] Whatever the source of the dispute, by the early 1970s the United States began prosecuting farmers for waterfowl easement violations.[58] This controversy, stemming from alleged questionable practices in the acquisition of wetlands easements and subsequent prosecutions, caused the North Dakota Legislature to review the federal-state waterfowl habitat preservation effort.[59] As a result, North Dakota enacted legislation in 1977 which intended to restrain further federal purchases of wetland easements in the state.[60]

Two years later, the United States, at the request of the FWS, sued the State of North Dakota, seeking a declaratory judgment that the 1977 state legislation restricting further federal acquisition of wetland easements was unconstitutional.[61] The United States District Court for the District of North Dakota granted summary judgment for the United

misrepresentations were deemed to be unauthorized acts and the United States was not bound thereby. *See, e.g., id.*

57. Brief for the State of North Dakota at 30-33, *North Dakota* (No. 81-773); *see also* Amicus Brief of North Dakota at 3, *Johansen* (No. 95-3996ND). In her amicus brief, the North Dakota Attorney General described the source of the federal-state dissolving partnership in wetlands preservation as follows:

> A number of federal actions disrupted the partnership and were inconsistent with Congressional intent that the state play a prominent role in the conservation program. Misrepresentations were made to landowners by FWS acquisition agents. Another irritant was the FWS's purchase of easements on strategically located wetlands to prevent construction of publicly-sponsored drainage projects. These actions, in effect, pre-empted state regulatory authority.

Amicus Brief of North Dakota at 4, *Johansen*, (No. 95-3996ND) (citations omitted). Of course, one might argue that the FWS could only purchase what landowners were willing to sell. One might ask why not direct the anger at the landowners instead of the FWS.

58. *E.g., Werner*, 581 F.2d 168; United States v. Albrecht, 496 F.2d 906 (8th Cir. 1974).

59. *See* Sen. Con. Res. 4048, 44th Leg. (N.D. 1975), *reprinted in* 1975 N.D. Laws 1729 (directing the Legislative Council to study the impact of refuge and waterfowl production area acquisitions by the FWS on North Dakota agriculture). Interestingly, as the court in *Johansen* recognized twenty-one years later, *infra* note 115-120, the North Dakota Legislature viewed the FWS' conveyance document for pre-1976 easements as posing problems for North Dakota farmers. *Id.* Specifically, the legislature's resolution stated: "[W]hereas, the [FWS has acquired] . . . easements over legal subdivisions . . . rather than the actual recognized boundaries of the wetlands which prevents, in some cases, the land outside the wetland but within the leased area, from being used to its maximum capacity for agricultural production." *Id.*

60. *See, e.g.*, Act of Apr. 21, 1977, ch. 204, § 1, 1977 N.D. Laws 461, 461-62 (withdrawing unconditional consent to federal refuge acquisitions under the Conservation Act by reserving complete authority and jurisdiction over all such areas) (codified as amended at N.D. CENT. CODE § 20.1-02-18.3 (1978)); Act of Apr. 21, 1977, ch. 204, § 3, 1977 N.D. Laws 461, 462-63 (allowing landowners to "drain any after-expanded wetland or water area in excess of the legal description in the lease, easement, or servitude" and providing that state consent to federal acquisitions for migratory bird refuges would be nullified if the Department of the Interior did not "agree to and comply with" the state-imposed limitations placed upon federal easement acquisitions) (codified as amended at N.D. CENT. CODE § 20.1-02-18.2(2) (1978)); Act of Mar. 31, 1977, ch. 426, § 1, 1977 N.D. Laws 923 (limiting all easements in North Dakota to 99 years, and requiring that the area of land encumbered by the easement shall be specifically described) (codified as amended at N.D. CENT. CODE § 47-05-02.1 (1978)).

61. United States v. North Dakota, Civ. No. A1-79-62 (D.N.D. June 4, 1980).

States,[62] and the Eighth Circuit Court of Appeals affirmed.[63] The State of North Dakota appealed and certiorari was granted by the United States Supreme Court.[64]

C. THE IMPACT OF *NORTH DAKOTA V. UNITED STATES*

In *North Dakota v. United States*,[65] there were two main issues before the Supreme Court: (1) whether the requisite gubernatorial consent, once given, could be revoked by the State of North Dakota,[66] and (2) whether North Dakota could impose statutory conditions on the federal government's power to purchase further wetland easements in the State.[67] Before reaching those issues, however, the Court addressed two preliminary arguments advanced by North Dakota.[68] The Supreme Court's holding with respect to the second of these preliminary arguments is what most affects the decision in *Johansen*.[69]

62. *Id.*

63. United States v. North Dakota, 650 F.2d 911, 918 (8th Cir. 1981). Initially, the gubernatorial consent issue was confused at the lower court level, where the United States successfully argued that the gubernatorial consent provision did not govern federal acquisition of waterfowl production areas. *Id.* at 913. The court of appeals affirmed, holding that neither legislative nor gubernatorial consent was required prior to acquisition of waterfowl production areas. *Id.* at 916. However, by the time the case reached the Supreme Court, the parties agreed that gubernatorial consent was required for the United States to acquire state wetlands for waterfowl production areas. North Dakota v. United States, 460 U.S. 300, 310 n.13 (1983).

64. North Dakota v. United States, 455 U.S. 987 (1982).

65. 460 U.S. 300 (1983). In *Johansen*, the United States argued that prior Eighth Circuit decisions interpreted wetland easements to cover all wetlands on an encumbered parcel. United States v. Johansen, 93 F.3d 459, 462 (8th Cir. 1996); *see also* Brief of Appellee at 17-19, United States v. Johansen, 93 F.3d 459, 462 (8th Cir. 1996) (No. 95-3996ND) (arguing that Judge Benson's ruling in *United States v. Welte*, 635 F. Supp. 388 (D.N.D. 1982), which was affirmed by the Eighth Circuit, 696 F.2d 999 (8th Cir. 1982), stood for the proposition "that all of the wetlands which are found on the tract are covered by the easement restrictions," and also that the Eighth Circuit's decision in *United States v. Vesterso*, 828 F.2d 1234 (8th Cir. 1987), "again specifically affirmed its prior holdings that *all wetlands* found within the easement boundaries are protected" (emphasis in original)). The court in *Johansen* reasoned, however, that although prior circuit decisions supported this argument, the United States had failed to acknowledge the intervening Supreme Court decision in *North Dakota*. *Id.* at 462-63. The court stated that the Supreme Court's decision "adopted a more restricted interpretation" of federal wetlands easements. *Id.* at 463. This apparent controversy over the interpretation of the Supreme Court decision accordingly warrants a closer examination of the *North Dakota* ruling concerning the scope of federal wetlands easements.

66. *North Dakota*, 460 U.S. at 311. Recall that the Wetlands Loan Act of 1961 provided that "[n]o land shall be acquired with moneys from the migratory bird conservation fund unless the acquisition thereof has been approved by the Governor of the State or appropriate State agency." 16 U.S.C. § 715k-5 (1994).

67. *Id.* at 311. At issue here was North Dakota's authority to impose retroactive conditions on acquisitions authorized by consents already given. *Id.* at 316-17. Since the United States had only acquired approximately half of the total wetland acreage previously authorized by North Dakota governors, *id.* at 305, North Dakota was seeking to impose restrictions on the United States' power to acquire further wetlands easements on the remaining 750,000 available acres. *Id.* at 316-17; *see also supra* note 60 and accompanying text (explaining the various statutes passed by the North Dakota Legislature in 1977 which intended to restrain further federal acquisition of wetland easements in the State).

68. *North Dakota*, 460 U.S. at 311 n.14.

69. *Id.* The first preliminary argument advanced by North Dakota was that the gubernatorial consents authorized between 1961 and 1977 were invalid because they did not specify the particular

In the second of the preliminary arguments, North Dakota contended that the gubernatorial consents were exhausted because the United States had already acquired wetland easements over more acreage than had been authorized by the consents.[70] Specifically, North Dakota argued that the FWS was barred from acquiring further wetland easements in the State because the State's prior consents authorized acquisitions over only 1,517,437 acres of land, and the FWS had already acquired wetland easements over 4,788,300 acres.[71] North Dakota's contention that the FWS had already acquired easements covering 4,788,300 acres stemmed from the FWS practice of including legal descriptions of entire tracts of land in the actual easement conveyance instrument.[72]

The Supreme Court conceded that the gubernatorial consent limits would have been exhausted if in fact the entire tracts of land counted against the acreage permitted by the consents.[73] The Court concluded, however, that the easement restrictions applied only to wetland areas and not to the entire tract of land.[74] Therefore, the Court held that gubernatorial consent acreage limitations applied only to the wetlands within a parcel, and not to the entire parcel as legally described in conveyance instrument.[75] The Supreme Court's holding here is primarily what gave

parcels of land that were to be acquired. *Id.* The Court reasoned that neither the language of the enabling statute nor its legislative history suggested that parcel-by-parcel consent was necessary. *Id.* Moreover, since the enabling statute required consent only with respect to the "nature of the lands [and the acreage] involved," the county-by-county consents as given satisfied this standard. *Id.*

70. *Id.* at 311 n.14.

71. *Id.*

72. *Id.*; *see also supra* note 9 (discussing the pre-1976 FWS practice of including the legal description of the entire tract of land in the easement conveyance instrument).

73. *North Dakota*, 460 U.S. at 311 n.14.

74. *Id.* Specifically, the Court stated: "The fact that the easement agreements include legal descriptions of much larger parcels *does not change the acreage of the wetlands over which easements have been acquired*." *Id.* (emphasis added). Notably, the Court relied upon the interrogatory answers of then FWS Director, Lynn A. Greenwalt, in reaching this conclusion. *Id.* Specifically, when Greenwalt was asked what the total acreage (wetland and upland) of permanent easements as Waterfowl Production Areas was in North Dakota, he responded: "[t]he total acreage described in the permanent easements for Waterfowl Production Areas acquired in North Dakota by the Fish and Wildlife Service, USDI, is 4,788,300 acres; however, *the easement restrictions on draining, burning, filling, and leveling only apply to 764,522 wetland acres*." Appellants' Brief at 20, United States v. Johansen, 93 F.3d 459 (8th Cir. 1996) (No. 95-3996ND) (citing to Plaintiff's Answers to Defendant's First Set of Interrogatories and Response to Defendant's First Request for Production of Documents, United States v. North Dakota, Civ. No. A1-79-62 (doc. #9, filed July 24, 1979)) (emphasis added). The FWS Director also stated that the 764,522 acreage figure was computed from the "summation of the wetland acres reported on the Easement Summary Sheets for all waterfowl production areas acquired in North Dakota." *Johansen*, 93 F.3d at 64 n.7.

75. *North Dakota*, 460 U.S. at 311 n.14. However, a different, and arguably valid, interpretation was given to this ruling by the National Audubon Society in its *amicus* brief filed in support of the United States' petition for rehearing *en banc*. The Audubon Society argued:

> [The Supreme Court rejected the argument] . . . that progress toward the 1.5 million cap should be measured by reference to the legal description of the entire parcels on which the wetlands are located. *That is all the Court decided* in its brief discussion of the issue. *The Court did not arrive at any conclusion about the actual acreage of wetlands easements* the United States had acquired relative to the 1.5 million cap, much less

the court in *Johansen* the basis for its narrow interpretation of the Johansen easements.[76]

After rejecting the preliminary arguments advanced by North Dakota,[77] the Court addressed the validity of North Dakota's 1977 legislation that intended to restrain further federal acquisitions of wetland easements in the State.[78] Of relevance to this Comment was the North Dakota statute which purported to limit boundaries of wetlands previously acquired by the United States.[79] Specifically, this statute permitted landowners to "drain any after-expanded wetland or water area in excess of the legal description in the easement."[80] North Dakota sought to retroactively apply the statute to wetland easements already

> endorsed the [Johansens'] position in this litigation that the United States is bound to specific acreages in the [FWS'] 'Easement Summary' and other documents derived from those calculations.

Memorandum of Amicus Curiae Nat'l Audubon Soc'y in Support of Petition by the U.S. for Rehearing at 8-9, *Johansen*, (No. 95-3996ND) (emphasis added). A narrow reading of the Supreme Court's ruling in *North Dakota* certainly supports the Audubon Society's position. The court in Johansen at least impliedly acknowledged some ambiguity with respect to this particular ruling. *See infra* note 119 and accompanying text.

76. *See Johansen*, 93 F.3d at 465 n.8 (stating that the Supreme Court's "treatment of this argument implicitly suggests . . . that the 'acreage' is a set figure and not subject to fluctuation.").

77. *See supra* notes 67-74 and accompanying text (discussing North Dakota's two preliminary arguments which the Court rejected in footnote 14 of its decision). The Court also rejected the argument that the gubernatorial consents, even if valid and not exhausted, had been effectively revoked by the State. *North Dakota*, 460 U.S. at 312. North Dakota based its argument on the notion that § 715k-5 required not only the initial consent of the State's governor, but also that this consent must be continual. *Id.* That is, the governor must continue to consent until the moment the land is acquired. *Id.* Therefore, because the FWS had only acquired wetland easements over approximately half the acreage consented to by its governors, North Dakota argued that it could terminate the United States' power to acquire the remaining acreage. *Id.* Finding the language of the Wetlands Loan Act to be "uncomplicated," the Court concluded that nothing in the statute authorized the withdrawal of consent previously given. *Id.* at 312-13. Nor did the Court find anything in the legislative history indicating Congress' desire to permit governors to revoke their consent once given. *Id.* at 313. Noting the role of the State once consent is given, the Court stated:

> We are unwilling to assume that Congress, while expressing its firm belief in the need to preserve additional wetlands, so casually would have undercut the United States' ability to plan for their preservation. Clearly, Congress intended the States to play an important role in the planning process. But once plans have been made and the Governor's approval has been freely given, the role of the State is at an end.

Id. at 315. Therefore, the Court held that gubernatorial consent could not be revoked once given. *Id.* at 321.

78. *North Dakota*, 460 U.S. at 316.

79. *Id.* at 317-19 (discussing the validity of N.D. CENT. CODE § 20.1-02-18.2(2) which permitted landowners to "drain any after-expanded wetland or water area in excess of the legal description in the easement . . ."). The other two North Dakota statutes challenged were sections 20.1-02-18.1 and 47-05-02.1. *Id.* at 316-320. The former imposed conditions on previously approved acquisitions, while the latter limited easements conveyed in the state to 99 years. *Id.* Here again, the premise that previously given consent is irrevocable invalidated North Dakota's argument concerning the two statutes. *Id.* at 317-321. The Court reasoned that the State could not impose conditions on previously approved acquisitions since it could not revoke its consent even if the conditions were not met. *Id.* at 317. The Court held that North Dakota's legislation could not restrict the United States' further acquisition of wetlands easements pursuant to the previously given gubernatorial consents. *Id.* at 321.

80. *Id.* at 317 (citing N.D. CENT. CODE § 20.1-02-18.2(2) (Supp. 1981)). The United States did not challenge the portions of section 20.1-02-18.2 which permitted landowners to "negotiate the conditions of an easement and restrict the scope of the easement to a particular legal description." *Id.*

purchased by the federal government.[81] However, the Court disagreed with a scheme that imposed restrictions on easements acquired under previously given consents, and held that the statute was hostile to federal law.[82] More importantly to the *Johansen* case, however, is the Supreme Court's ruling that the United States may incorporate into easement agreements restrictions on wetlands outside the bounds of the easement itself.[83] The Supreme Court's ruling regarding after-expanded wetlands may demonstrate that the figures in the Easement Summaries are not an absolute limit on the amount of wetlands subject to easement restrictions during wet years.[84]

D. THE IMPACT OF *UNITED STATES V. VESTERSO*

In *United States v. Vesterso*,[85] the Eighth Circuit Court of Appeals

81. *Id.* at 319.

82. *Id.* at 318. The Court interpreted section 20.1-02-18.2 to be contrary to a standard clause that was a part of *post-1976* federal wetland easement conveyance instruments. *Id.* at 317. That clause expressly prohibited the draining of after-expanded wetlands, and thus North Dakota's statute would "void such clauses even when agreed to by the landowner." *Id.* Therefore, to the extent that the state statute authorized landowners to drain after-expanded wetlands contrary to terms of the easement agreement, it was hostile to federal law and could not be applied to easements acquired pursuant to consents already given. *Id.* at 319. The Court quoted approvingly the following language from *United States v. Little Lake Misere Land Co.*, 412 U.S. 580 (1973): "To permit state abrogation of the explicit terms of a federal land acquisition would deal a serious blow to the congressional scheme contemplated by the Migratory Bird Conservation Act . . . ." *North Dakota*, 460 U.S. at 318.

83. *North Dakota*, 460 U.S. at 319. The crucial language is as follows:

> The United States is authorized to incorporate into easement agreements such rules and regulations as the Secretary of the Interior deems necessary for the protection of wildlife, and *these rules and regulations may include restrictions on land outside the legal description of the easement*. To respond to the inherently fluctuating nature of wetlands, the Secretary has chosen to negotiate easement restrictions on *after-expanded wetlands as well as those described in the easement itself*. As long as North Dakota landowners are willing to negotiate such agreements, the agreements may not be abrogated by state law.

Id. (citations and footnotes omitted) (emphasis added).

84. In fact, the United States forcefully argued in its petition for rehearing that the *Johansen* court's holding, that federal wetlands easements are limited to the acreage as specified in the Easement Summaries, contradicted the Supreme Court's ruling regarding "after-expanded wetlands." Petition for Rehearing and Suggestion for Rehearing *En Banc* at 8-9 (filed Oct. 2, 1996), United States v. Johansen, 93 F.3d 459 (8th Cir. 1996) (No. 95-3996ND). *See infra* notes 153-60 (analyzing the United States' argument that the holding in *Johansen* contradicts the Supreme Court's ruling in *North Dakota* regarding "after-expanded wetlands").

85. 828 F.2d 1234 (8th Cir. 1987). The United States argued in its motion *in limine* that the holding in *Vesterso* precluded the Johansens from asserting their "acreage defense" at trial. Appellants' Brief at 24, *Johansen* (No. 95-3996ND); *see supra* note 17 (explaining what the Johansens' "acreage defense" means in the context of this case). The district court agreed that such a defense was improper based on the circuit's prior holding in *Vesterso*. United States v. Johansen, No. C3-95-62, slip op. at 1-2 (D.N.D. Nov. 14, 1995) (granting United States' motion *in limine*). Specifically, the district court stated:

> The United States seeks to exclude the 'acreage limitation defense' set forth in defendants' briefs. The defense is improper in this case. The language of *United States v. Vesterso*, 828 F.2d 1234 (8th Cir. 1987), is clear as to what the government must prove. As in *Vesterso*, a defense may not be based on gubernatorial consents . . . , or on resulting easement summaries or summary records. The United States motion in limine . . . is therefore GRANTED.

affirmed the convictions of three water resource district board members for damaging wetlands subject to federal easements in Towner County, North Dakota.[86] The case was defended in part on the basis that the United States had failed to establish that the wetlands damaged by the defendants were actually encumbered by federal wetland easements.[87] Specifically, the defendants maintained that the FWS had acquired more wetland acres in Towner County than had been authorized by the gubernatorial consents.[88] The defendants therefore argued that since the United States had not established which wetlands were within the gubernatorial limitations, it had not been established beyond a reasonable doubt that the defendants had damaged federal property.[89] At trial, the defendants attempted to submit evidence that Towner County's acreage limitation was 27,000 acres, and that county acreage actually encumbered with wetland easements totaled over 150,000 acres.[90] The *Vesterso* court held, however, that the trial court properly denied these offers of proof.[91]

The court in *Vesterso* based its holding on the fact that both the Supreme Court and prior Eighth Circuit decisions had established that gubernatorial consent acreage limitations applied to established "wetland[s] within a parcel and not to the entire parcel subject to the easement."[92] The court interpreted the pertinent language from *North*

Id. at 1.

In discussing the district court's pretrial order, the *Johansen* court stated that the decision was "predicated on a fundamental (albeit understandable) misinterpretation" of Eighth Circuit precedent concerning the scope of federal wetlands easements. United States v. Johansen, 93 F.3d 459, 468 (8th Cir. 1996). The apparent contradictory interpretations of the Eighth Circuit decision accordingly warrants a closer examination of *Vesterso* and its ruling concerning the scope of federal wetlands easements.

86. United States v. Vesterso, 828 F.2d 1234, 1245 (8th Cir. 1987). In the 1960s, the United States purchased wetland easements in Towner County, North Dakota, pursuant to the Stamp Act. *Id.* at 1236. In 1983, the Towner County Water Resource District Board began planning for two drainage projects. *Id.* at 1236-37. The projects essentially cut a ditch through three parcels of property that were encumbered by federal wetland easements. *Id.* at 1237. Kent Vesterso was one of the board members involved in the planning of the projects. *Id.* The United States prosecuted Vesterso and others for damaging federal property. *Id.* at 1238. The pre-1976 wetland easements violated in *Vesterso* are identical to those that encumber the Johansens' land. *Compare Vesterso*, 828 F.2d at 1237 n.2 (quoting the text of one of the easements at issue), *with supra* note 2 (quoting relevant language from one of the Johansens' easements).

87. *Vesterso*, 828 F.2d at 1241.

88. *Id.*

89. *Id.* Notably, this argument advanced by the defendants in *Vesterso* is arguably very similar to the "acreage defense" which the Johansens attempted to raise in the district court. *See infra* note 135 and accompanying text (discussing the distinction between these two similar arguments, and the *Johansen* court's justification for not interpreting *Vesterso* as precluding the Johansens' "acreage defense").

90. *Vesterso*, 828 F.2d at 1241. Notably, this evidentiary offer of proof is premised on essentially the same argument advanced by the State of North Dakota in the *North Dakota* litigation to support its contention that the previously given gubernatorial consents were exhausted and thus the corresponding easements were invalid. *See supra* note 70-75 and accompanying text (discussing North Dakota's argument that the gubernatorial consents given by the State had been exhausted and accordingly the FWS was barred from acquiring further wetland easements in the State).

91. *Vesterso*, 828 F.2d at 1241.

92. *Id.*; *see also supra* note 74 and accompanying text (discussing and citing the language in

Dakota to mean that wetland easement restrictions did not apply to entire parcels of property despite the entire parcel being described in the easement document's legal description.[93] This, the court reasoned, was because there were certain portions of property within the entire parcel that did not meet the definition of a wetland as expressed in the easement agreements.[94] The court concluded that this interpretation met the purpose of "identifying acreage limitations in the gubernatorial consents" which was to limit amount of state property subject to the wetland easement restrictions.[95]

Based on this interpretation, the *Vesterso* court determined the United States' burden of proof in wetland violation cases.[96] First, the United States was not required to legally describe each wetland subject to the easement restrictions in order to establish that the county gubernatorial consent acreage limits have not been exceeded.[97] Second, if the United States proved the presence of recorded easements that clearly described the terms and the existence of "identifiable wetlands" on the parcel, this would sufficiently prove that the United States had a property interest in the wetlands on the parcel.[98] Accordingly, the court held that it was "sufficient for the United States to prove beyond a reasonable doubt that identifiable wetlands were damaged and that those wetlands were within parcels subject to federal easements."[99] Therefore, until

North Dakota regarding the gubernatorial consent limitation argument advanced by the State of North Dakota).

93. *Vesterso*, 828 F.2d at 1242.

94. *Id.* Specifically, the court stated that "the restrictions mentioned in the easement agreements do not apply to portions of property, which, although included within the easements' legal description, *do not meet the definition of a wetland* as *expressed in the easement agreements*." *Id.* (emphasis added).

95. *Id.* Although the court does not explain what "identifying acreage limitations in the gubernatorial consents" means, the author assumes that the court is referring to the FWS practice of specifying the number of wetland acres purchased in the separate Easement Summary documents. *See* Sagsveen, *supra* note 9, at 684-85 (describing the pre-1976 FWS practice of including the legal description of the entire tract of land, *i.e.*, half section, quarter section, in the easement conveyance instrument).

96. *Vesterso*, 828 F.2d at 1242. The district court characterized *Vesterso* as setting the standard of "what the government must prove" in a wetland violation case. United States v. Johansen, No. C3-95-62, slip op. at 1 (D.N.D. Nov. 14, 1995) (granting United States' motion *in limine*).

97. *Vesterso*, 828 F.2d at 1242. The court supported this holding based on a ruling by the Supreme Court in *North Dakota*. *Id.* at 1241-42 (stating that *North Dakota* "established that the acreage limitation in the gubernatorial consents applies to the established wetland within a parcel and not to the entire parcel subject to the easement"). The *Vesterso* court also noted the impact that the gubernatorial consents have on federal wetlands easement agreements. *Id.* at 1242. The court, noting the role of the gubernatorial consent, stated that "[t]he gubernatorial consent to the acquisition of the federal easements described in the easement agreements has already been given. It cannot now have an effect on that property interest." *Id.* The court reasoned that although the Stamp Act requires gubernatorial consent and limits the total acreage that may be subject to federal easements, alleged discrepancies cannot be raised when gubernatorial consent has previously been given and the United States has presented a recorded easement describing the wetlands in clear terms. *Id.*

98. *Id.*

99. *Id.* Notably, the court in *Vesterso* did not clearly explain how the United States would be able to prove that "identifiable wetlands were damaged." *Id.* In other words, in situations involving

Johansen, the court in *Vesterso* had seemingly determined the government's burden of proof in cases involving federal wetland easement violations.[100]

III. CASE ANALYSIS

In *Johansen*, the Eighth Circuit Court of Appeals interpreted the scope of three federal wetland easements that encumbered farmland in Steele County, North Dakota.[101] Specifically, the court addressed the issue of whether federal wetland drainage restrictions applied to all the

pre-1976 easements, how was the government to prove that "identifiable wetlands" were damaged, since pre-1976 easements give no description (of size or location) of the particular wetlands on the tract of land? The fact that that question was left open to interpretation in *Vesterso*, is arguably the reason that nine years after *Vesterso* pre-1976 easements are still being interpreted as to scope. Now that this question of interpretation has been answered by the court in *Johansen*, the question remains whether the decision in *Johansen* is supported by, or consistent with, the ruling in *Vesterso*. In that vein, it is significant to note that *Vesterso* recognized that there are limitations to the number of acres the federal government may acquire. *Id.* at 1241. Specifically, the court stated that "the clear purpose of identifying acreage limitations in the gubernatorial consents [was] to limit the amount of property that can be subject to [easement] restrictions." *Id.* at 1242. The court's recognition of the Congressionally authorized and State-imposed acreage limitations, arguably supports the *Johansen* court's narrow interpretation of pre-1976 easements. *Cf.* United States v. Johansen, 93 F.3d 459, 466 (8th Cir. 1996) (stating that "we believe it more prudent to . . . interpret[] the easements' scope in a matter that fixes the federal acreage counted against the gubernatorial consent limitation"). An alternative argument could be made, however, that certain language in *Vesterso* also recognized, as the Supreme Court did in *North Dakota*, that the FWS was given the authority to negotiate easements in a way that "respond[s] to the inherently fluctuating nature of wetlands." North Dakota v. United States, 460 U.S. 300, 319 (1983). For example, the court in *Vesterso* states that easement restrictions do not apply to those acres on the tract that "although included within the easement's legal description, do not meet the *definition of a wetland*" as expressed in the easement itself." *Vesterso*, 828 F.2d at 1242 (emphasis added). The argument could be made that *Vesterso* impliedly recognized that easement restrictions are not confined to the acreage amount as specified in the Easement Summaries because of the inherently fluctuating nature of a prairie pothole wetland. *See id.* This proposition is supported by the view in the wetland ecology field that formulation of a definition for wetlands is "difficult . . . because wetlands represent *transitional zones between upland and aquatic ecosystems*, and wetlands therefore exhibit some characteristics of each." BALDASSARRE, *supra* note 26, at 444-46 (emphasis added). Workable and recognized definitions, however, do exist. As an example, a definition of wetlands that is agreed upon by the FWS, Natural Resource Conservation Service, Environmental Protection Agency, and U.S. Army Corps of Engineers states:

> Wetlands possess three essential characteristics: (1) hydrophytic vegetation, (2) hydric soils, and (3) wetland hydrology, which is the driving force creating all wetlands. These characteristics and their technical criteria for identification . . . are mandatory and must all be met for an area to be identified as wetland. Therefore, areas that meet these criteria are wetlands.

Id. at 447 (citing to the Mandatory Technical Criteria for Wetland Identification as agreed upon by the previously mentioned agencies). To illustrate further, hydric soils, which are "especially useful in identifying wetland boundaries," are those soils that are flooded long enough (usually seven to ten days) during a growing season to support the growth of plants called "hydrophytes." *Id.* at 446. Therefore, although the *Vesterso* court did not explicitly explain how the United States would be able to prove that "identifiable wetlands were damaged," the preceding definition of a wetland could provide a way to do so. Moreover, this definition, serving as a means to prove "identifiable wetlands" were damaged, would accommodate the Supreme Court's recognition that the FWS was necessarily given the authority to negotiate easements in a way that "respond[s] to the inherently fluctuating nature of wetlands." *North Dakota*, 460 U.S. at 319.

100. *See supra* note 96 and accompanying text (stating that the district court in this case characterized the language in *Vesterso* as making it "clear as to what the government must prove").

101. United States v. Johansen, 93 F.3d 459, 462-63 (8th Cir. 1996).

wetlands found on an encumbered tract of land, or were limited to the "wetland acres" as specified in the administrative Easement Summaries.[102] Judge Heaney, writing for a unanimous panel, adopted a narrower interpretation of the Johansens' wetlands easements than that advocated by the United States,[103] and than that given to similar easements in past Eighth Circuit decisions.[104] The court held that federal wetland easement restrictions are limited to the "wetland acres" as specified in the accompanying administrative Easement Summaries.[105] The court therefore reversed the district court's evidentiary ruling denying the Johansens' "acreage defense."[106]

To determine whether the Easement Summaries were indeed relevant evidence, the *Johansen* court first found it necessary to review how similar wetland easements had been previously interpreted.[107] In that vein, the United States argued that prior decisions by the Eighth Circuit expressly interpreted the wetland easement restrictions to encompass all wetlands on an encumbered parcel.[108] The court conceded that the United States' argument was not unreasonable for two reasons.[109] First, the legal description in the easement conveyance instruments did in fact describe the entire farmland tract.[110] Second, Circuit case law, at least until the early 1980s, supported the United States' broad interpretation that the easement restrictions prohibited drainage on any portion of an encumbered tract of land.[111] The court concluded, however, that the

102. *Id.* at 463-64; *see also* Sagsveen, *supra* note 9 (explaining that this case arose in large part due to the pre-1976 FWS practice of having easement conveyance documents describe the wetland easement as encumbering the entire tract, while the accompanying Easement Summaries represented that the FWS purchased specific quantities of wetland acreage on the tract).

103. *Johansen*, 93 F.3d at 463. The United States maintained that there were "no uncovered wetlands on [the Johansens'] property." Brief of Appellee at 20, United States v. Johansen, 93 F.3d 459 (8th Cir. 1996) (No. 95-3996ND).

104. *Id.* at 465; *see also infra* note 111 (citing Eighth Circuit decisions which interpreted similar federal wetland easements more broadly).

105. *Johansen*, 93 F.3d at 468.

106. *Id.*

107. *Id.* at 463-64.

108. *Id.* at 463. The court characterized this argument as suggesting that "all wetlands found on an encumbered tract at any given time are covered by the easement and cannot be drained in any fashion." The Johansens, relying primarily on the Easement Summaries, argued that the easements covered only a portion of their property and not every wetland that might develop during any given year. *Id.* at 463-64.

109. *Id.* at 464.

110. *Id.*; *see also* Sagsveen, *supra* note 9, at 685-86 and accompanying text (describing the pre-1976 FWS practice of including the legal description of the entire tract of land, that is, half section, quarter section, in the easement conveyance instrument).

111. *Johansen*, 93 F.3d at 464; *see, e.g.*, United States v. Seest, 631 F.2d 107, 108 (8th Cir. 1980) (holding that ditching parcel, although not diminishing the surface water, altered the natural flow of surface and subsurface water, violating the terms of the wetland easement); United States v. Albrecht, 496 F.2d 906, 912 (8th Cir. 1974) (holding that a federal wetland easement was not void because the United States acquired the easement over an entire section of land); United States v. Welte, 635 F. Supp. 388, 389 (D.N.D. 1982) (holding that the government was not required to separately identify the 22 acres delineated in the Easement Summaries, since the government had "obtained its easement on

Supreme Court decision in *North Dakota v. United States*[112] rejected the broader interpretation that had been established by the Eighth Circuit.[113]

Regarding the *North Dakota* litigation, the *Johansen* court emphasized the position the United States took in response to North Dakota's argument that the FWS had exceeded gubernatorial consent acreage limitations.[114] The court noted that for the purposes of gubernatorial consent acreage limitations, the United States had maintained that it acquired easements over only 764,522 wetland acres, a figure based on acreage figures specified in the Easement Summaries.[115] In other words, for purposes of the *North Dakota* litigation, the United States took the position that it acquired easements only over the number of acres that corresponded with the acreage listed as "wetland acres" in the Easement Summaries.[116] Yet, in *Johansen*, the United States argued that all wetland acres within a particular easement tract were subject to drainage restrictions.[117] Noting the contradiction in positions, the *Johansen* court

all 160 acres").

112. 460 U.S. 300 (1983).

113. *Johansen*, 93 F.3d at 465 (citing to *North Dakota*, 460 U.S. at 311 n.14). The decision in *United States v. Welte*, 635 F. Supp. 388 (D.N.D. 1982), a case decided just prior to the *North Dakota* decision and involving a defense theory similar to the Johansens' acreage defense, illustrates the change in interpretation of pre-1976 wetland easements by the Supreme Court. In *Welte*, the defendant was convicted of ditching through a pothole on land encumbered by an easement identical to the Johansens' easements. *Id.* at 388-89. In his defense, Welte asserted that the United States had not proven that the drained land was part any property covered by the easement. *Id.* at 389. This contention, like the Johansens' acreage defense, was based upon the acreage as specified in the Easement Summaries, which in this case stated that the easement tract included 22 acres of wetlands. *Id.* In rejecting the defense, the district court concluded that "[h]ad the government obtained an easement on only 22 acres, appellant would have a valid point. The government obtained its easement on all 160 acres, however." *Id.* Yet, only one year later, the Supreme Court held that the easements' draining restrictions *did not* cover the entire tract of land, but instead applied only to the wetlands as accounted for by the FWS. North Dakota v. United States, 460 U.S. 300, 312 n.14 (1983). Recall that the wetlands accounted for by the FWS corresponded to the "summation of the wetland acres reported on the Easement Summary Sheets for all waterfowl production areas acquired in North Dakota." *See supra* note 74 and accompanying text (discussing the reliance by the Supreme Court on the FWS' position during interrogatories interposed at the district court level of the *North Dakota* litigation).

114. *Johansen*, 93 F.3d at 464-65. Specifically, the United States made the following argument in its brief before the Supreme Court:

> Largely because of the peculiar nature of waterfowl production area country . . . the Secretary has not attempted to acquire easements based on metes and bounds descriptions of the individual wetlands or potholes. Rather, he has adopted the practice of acquiring easements covering all of the wetlands occurring on a given described legal subdivision. Thus, while the easement instrument *describes* a legal subdivision, the easement *restrictions* apply only to the wetlands occurring on that subdivision.

Brief of the United States at 18, *North Dakota* (No. 81-773) (emphasis in original).

115. *Johansen*, 93 F.3d at 464.

116. *Id.* at 464-65 (emphasis added). Specifically, the *Johansen* court noted: "[F]or the purposes of [the *North Dakota*] litigation, the United States contended that the wetland easement restrictions applied only to the thirty-three, thirty-three, and thirty-five acres on the Johansens' tracts. The Supreme Court accepted the federal government's interpretation of the easement restrictions." *Id.* at 465. The *Johansen* court found support for the conclusion that the Supreme Court accepted the United States' position in footnote 14 of the *North Dakota* case. *See Id.* at 465 (quoting approvingly the language from footnote 14); *see also supra* notes 74-75 and accompanying text (discussing the Supreme Court's holding from footnote 14).

117. *Johansen*, 93 F.3d at 465; *see* Appellee's Reply Brief to North Dakota's Amicus Brief at 3,

stated that the implication of the United States' position in *North Dakota* could only mean in the context of this case that "the United States acquired easements over thirty-three acres on tracts 21X and 24X and thirty-five acres on tract 30X."[118]

The court was careful to note, however, that although the Supreme Court in *North Dakota* had accepted the United States' argument limiting the easement restrictions to the encumbered parcels' wetlands, the Court had not explicitly limited the wetland easements to the number of wetland acres as specified in the Easement Summaries.[119] Nonetheless, the *Johansen* court concluded that while the Supreme Court's language in *North Dakota* could be interpreted to include all wetlands on a tract covered by an easement, such an interpretation would give rise to a "host of problems."[120]

Specifically, the court contemplated two problems that would accompany the adoption of the United States' interpretation whereby the easement restrictions covered all wetlands on an encumbered parcel.[121] First, if easement restrictions applied to all wetlands on an encumbered parcel, then the number of wetland acres subject to easement restrictions would fluctuate in any given year with the amount of rainfall.[122] Such fluctuation would be inconsistent with FWS wetland summaries that annually report the number of wetland acres under its control.[123] Fluctuating wetland acres would also be inconsistent with the norms of real property conveyance.[124] Furthermore, such a broad interpretation

Johansen (No. 95-3996ND) (responding to the State of North Dakota's contention that terms in the Easement Summaries place restrictions upon the federal governments property rights in addition to those contained in the easement agreements themselves). Specifically, the United States made the following argument:

> There is simply nothing inconsistent between the [FWS] conceding that *only* the wetlands within the larger tract [are] covered by the drainage limitations and therefore that only that acreage counted against the 'county consents' and the [FWS] at the same time contending that *all* wetlands within a particular easement tract are subject to its limitations. Quite to the contrary, that is precisely what the easement requires. By its specific terms, the limitations only apply to the wetlands and it applies to all wetlands.

Id. (emphasis in original).

118. *Johansen*, 93 F.3d at 465.

119. *Id.* The *Johansen* court uses the term "Summary Acreage" here. *Id.* Presumably, this is meant to represent the number of wetland acres specified in the Easement Summaries. *Id.* at 462, 468.

120. *Id.* at 465-66.

121. *Id.* at 466.

122. *Id.*

123. *Id.* The court noted that the FWS publishes annual summaries in which it continues to represent that it controls 33, 33, and 35 acres of wetland on the tracts in question *Id.* at 462. For over thirty years, in fact, the FWS has officially reported to Congress that they control by easements, 33, 33, and 35 acres respectively on the tracts in question. Appellants' Brief at 33, *Johansen* (No. 95-3996ND).

124. *Johansen*, 93 F.3d at 466 (citing to RESTATEMENT OF PROPERTY § 451 cmt. m (1944) (requiring definiteness)).

would preclude ditching anywhere on the legally-described tract of land.[125]

Second, the court recognized that the United States' interpretation would create problems with the gubernatorial consent acreage limitations.[126] The court reasoned that if easement restrictions fluctuated with the number of wetland acres present on a parcel at any given time, then so too would the wetlands counted against the gubernatorial limitations.[127] This potential variation "could conceivably" exceed the gubernatorial limitation during a wet year, and accordingly, violate the terms of the program's enabling statute.[128] The court reasoned that to give meaning to the gubernatorial consent provision a direct correlation must exist between the number of wetland acres applied against gubernatorial consents and the actual acreage encumbered by the wetland easements.[129] The court therefore held that federal wetland easements

125. *Id.* Specifically, the court reasoned that under the United States' interpretation, "any action that would inhibit the collection of water in a particular depression would violate its interest in existing and future wetlands." *Id.* Thus, ditching anywhere on the parcel would impact the formation of a wetland because these properties are typically pocketed by depressions at various depths. *Id.* The United States argued forcefully in its petition for rehearing *en banc* that a broader interpretation of these easements would not prevent ditching anywhere on the tract of land: "This fear is much exaggerated. The language of the easement makes clear that it covers only the draining of 'now existing or *reoccurring*' water. On its face, this language includes only periodic reoccurring wetlands, not land which is simply covered with water in times of exceptionally heavy rainfall." United States' Petition for Rehearing *En Banc* at 13, *Johansen* (No. 95-3996ND) (footnote omitted). Further, the United States stated that "[i]ndeed, the [FWS] has promulgated a 'sheetwater policy,' which expressly permits the draining of water outside of potholes or other reoccurring wetlands when the land is flooded due to exceptionally heavy rain." *Id.* at 13 n.12.

126. *Johansen*, 93 F.3d at 466; *see also supra* notes 31 and 44 and accompanying text (explaining the gubernatorial consent component of the federal wetlands program's enabling statute).

127. *Johansen*, 93 F.3d at 466.

128. *Id.* Interestingly, the court's position here was suggested by a commentator thirteen years earlier in this law review journal. *Cf.* Sagsveen, *supra* note 9, at 686 (arguing that the FWS's failure to describe the size and location of all wetlands subject to a wetland easement in a county could potentially exhaust gubernatorial consent limitations and cause wetlands to lose their protection during very wet seasons).

129. *Johansen*, 93 F.3d at 466. Two interesting and arguably valid arguments countering the court's reasoning here were raised by the United States and the Audubon Society in their petition for rehearing *en banc* briefs. First, the United States argued that even under the view that fluctuating wetland acres may exceed the gubernatorial consent caps, "the solution is not to limit the extent of the easements already taken and to ignore the unambiguous language of those easements — it would be to limit the extent of easements which subsequently pushed the acreage figure higher than the acreage in the governor's consent." United States' Petition for Rehearing at 14, *Johansen* (No. 95-3996ND). This argument is supported by the fact that the state consent cap is on a county wide basis, rather than on an individual basis. Interview with Lynn Crooks, Assistant United States Attorney for North Dakota, in Fargo, North Dakota (Sept. 3, 1996) [hereinafter Interview with Crooks]. Thus, if in a given year the consent cap was exceeded due to excessive flooding, only the last easements acquired would be affected, and not all individual easements proportionally. *Id.* It follows then that since the Johansens' easement are some of the earliest ones taken in Steele County, theirs would not be affected by anything short of a flood of biblical proportions. *Id.* The Audubon Society, taking a procedural angle, argued that there was "no basis, in the context of this case, for adopting a restricted interpretation of the easement acreages based on a concern" that fluctuating wetlands would exceed gubernatorial consents. Memorandum of Amicus Curaie National Audubon Society in Support of Petition for Rehearing at 12, *Johansen* (No. 95-3996ND). The Audubon Society pointed out that the Johansens', in their opening brief on appeal, affirmed the fact that the gubernatorial consent limitation

purchased prior to 1976 were limited to the acreage provided in the Easement Summaries.[130]

Based on its interpretation of the easements in question, the court addressed the United States' motion *in limine* to the district court.[131] The United States had argued that the court in *United States v. Vesterso*[132] rejected the notion of limiting wetland easement restrictions to the wetland acres listed in the Easement Summaries.[133] However, to interpret *Vesterso* in a manner consistent with this opinion, the court explained that the language of *Vesterso* must be understood within the context of the opinion.[134] *Vesterso*, the court explained, simply rejected the defendants' argument that the United States failed to comply with the program's gubernatorial limitations by not "identifying all wetlands covered by the federal easements."[135] In other words, *Vesterso* stood for

for Steele County, North Dakota did not exceed the acres authorized. *Id.* (citing to Appellants' Brief at 11-12, *Johansen* (No. 95-3996ND)). Therefore, the *Johansen* court's concern for gubernatorial consent caps being exceeded was irrelevant to the resolution of the instant case. *Id.* Neither of the preceding arguments were advanced by the United States in its opening brief on appeal, but only upon petitioning for rehearing *en banc*.

130. *Johansen*, 93 F.3d at 466. The court stated that this interpretation has the "additional advantage" of being consistent with "prior representations by the federal government of its interest in the properties." *Id.* at 466-67. Specifically, the court noted the United States' position taken in *North Dakota*, 460 U.S. at 311 n.14, and the wetland acreage totals as reported in the FWS Annual Survey. *Id.*; *see supra* note 74 and accompanying text (discussing the position taken by the FWS during interrogatories interposed at the district court level of the *North Dakota* litigation).

131. *Johansen*, 93 F.3d at 467.

132. 828 F.2d 1234 (8th Cir. 1987).

133. *Johansen*, 93 F.3d at 467.

134. *Id.* The court concluded that the United States had taken the *Vesterso* language out of context. *Id.*

135. *Id.* The court is apparently referring to the following argument made in *Vesterso* by the defendants:

> The [defendants] claim that the United States did not establish that the wetlands damaged in this case were actually covered by federal easements. According to the appellants, Congress allowed the State to limit the number of acres which could be subject to federal easements. The [defendants] assert that the limit established by the State has been exceeded. Because it has not been established which wetlands were within the limitation and which were without it, it has not been established beyond a reasonable doubt that the appellants damaged federal property.

Vesterso, 828 F.2d at 1241; *see also supra* notes 88-91 (discussing the holding from *Vesterso* regarding this argument). This argument advanced by the defendants in *Vesterso* is arguably very similar to the "acreage defense" which the Johansens asserted in this case. In fact, the United States argued in its appellate brief that the defense offered by the defendants in *Vesterso*, and rejected by the that court, was the same as the argument advanced by the Johansens in their "acreage defense." Specifically, the United States argued:

> In *Vesterso* . . . the defendants, like the [Johansens], apparently thought they saw a possible change in the law in footnote 14 of the Supreme Court opinion [in *North Dakota*]. [The defendants in *Vesterso*] argued that the Supreme Court was limiting the coverage of the easements to the precise number of wetland acres contained in the wetland summaries. This court disagreed . . . [and] affirmed the district court's refusal of an offer of proof, again based upon wetland summaries, which purported to show that while the United States had only been authorized 27,000 wetland acres, it had actually encumbered 151,743.

Brief of Appellee at 17-18, *Johansen* (No. 95-3996ND). Arguably, the United States' argument here is slightly misplaced. The Johansens' "acreage defense" theory did not involve an evidentiary offer

the proposition that under pre-1976 easements the United States need not legally describe the confines of each *covered* wetland to comply with gubernatorial consent limitations, an issue that had already been decided by the Supreme Court in *North Dakota*.[136] Therefore, the *Vesterso* language was not to be read as prohibiting draining of any wetland on an encumbered parcel.[137]

The *Johansen* court next distinguished the government's burden of proof as established in *Vesterso* and that required as a result of the holding in this case.[138] The holding in *Vesterso*, the court explained, meant that the United States must prove that "identifiable, *covered* wetlands (as existing at the time of the easement's conveyance and described in the Easement Summary) were damaged," and that the Johansens knew the parcel was encumbered by a federal easement.[139]

Finally, the court pointed to two other factors to further support this "revised interpretation."[140] First, the court referred to cautionary language at the end of the *Vesterso* opinion which, the court claimed, further clarified the meaning of the *Vesterso* holding with respect to the government's burden of proof.[141] That is, the *Vesterso* court had cautioned landowners that the first step before undertaking any drainage on encumbered tracts of land was to consult with the FWS.[142] The court

of proof whereby they alleged that particular easements were invalid because gubernatorial consents had been exhausted. In fact, the Johansens conceded that the "FWS has *not* exceeded the governor's 9,618 wetlands acres cap in Steele County, North Dakota, because under [*North Dakota*] it is clear the FWS has acquired only 3,977 acres of wetlands easements in Steele County." Appellants' Brief in Response to Government's Petition for Rehearing *En Banc*, at 8-9, *Johansen* (No. 95-3996ND). Rather, the Johansens' "acreage defense" is built on the premise that for pre-1976 wetland easements, the easement restrictions apply only to those wetlands which correspond to the number of acres as specified in the Easement Summaries. *Supra* note 17 (explaining the "acreage defense"). Though this distinction was not discussed by the *Johansen* court in its opinion, it does support the court's holding which narrowed the interpretation of prior Eighth Circuit decisions involving wetland easements.

136. *Johansen*, 93 F.3d at 467.

137. *Id.*

138. *Id.* at 467-68.

139. *Id.* at 467 (emphasis and parentheses in original). Notably, the *Johansen* court just adds a few clarifying words to the pertinent language from *Vesterso*. *Compare Vesterso*, 828 F.2d at 1242 (stating that "[the United States must prove] that *identifiable wetlands were damaged* and that those wetlands were within parcels subject to federal easements"), *with Johansen*, 93 F.3d at 467 (stating that "[the United States must prove] that *identifiable, covered wetlands (as existing at the time of the easement's conveyance and described in the Easement Summary) were damaged* and the defendant knew that the parcel was subject to a federal easement") (emphasis added in both quotations).

140. *Johansen*, 93 F.3d at 467-68.

141. *Id.* at 467.

142. *Id.* The *Johansen* court is referring to the following language from *Vesterso*:

> We point out, however, that the State of North Dakota and landowners are not without recourse if the easements cause flooding, for example, which results from nonnatural obstructions to water flow. *The prudent course in any event requires consultation with the [FWS] before undertaking drainage on parcels covered by easements.*

Id. (citing to *Vesterso*, 829 F.2d at 1245) (emphasis added by court). In the author's opinion, this statement by the *Vesterso* court implicitly acknowledged that in years of excessive moisture, drainage would be a normal course of action, so long as such action was predicated by consultation with the FWS.

noted that the Johansens had sought cooperation with the FWS in their efforts to contain the flooding that covered their farmland, but that the cooperation envisioned by the court in *Vesterso* was not forthcoming.[143] Second, the court referred to *United States v. Schoenborn*,[144] a federal wetlands violation case in which the Eighth Circuit Court of Appeals for the first time examined evidence showing which wetlands existed at the time of the easement conveyance.[145] Such an examination, the *Johansen* court reasoned, was a "clear departure" from the court's prior practice of focusing on any ditching of the encumbered parcel.[146] Therefore, *Schoenborn* "implicitly acknowledged" a narrower interpretation of federal wetland easements.[147]

Based on the foregoing analysis, the court in *Johansen* held that the federal wetland easements at issue acquired title only on the amount of acreage specified in the Easement Summaries that accompanied the easement document itself.[148] The court concluded that the language from *Vesterso* required that the culpability element of this crime must be met by proof that the defendant knew the parcel was subject to a wetland easement.[149] However, in an effort to clarify the holding in *Vesterso*, the court ruled that the United States must also prove that the landowner "drained the Summary Acreage covered by the federal wetland easement."[150] Conversely, the court reasoned, a defendant must be allowed to introduce evidence to prove that they did not damage Summary Acreage.[151] The court therefore reversed the district court's pretrial evidentiary ruling and remanded the case consistent with the opinion.[152]

143. *Id.*; *see also supra* notes 12-15 and accompanying text (discussing the correspondence between Kerry Johansen and the FWS).

144. 860 F.2d 1448 (8th Cir. 1988).

145. *Schoenborn*, 860 F.2d at 1453-55. In *Schoenborn*, the defendant was charged for damaging federal wetland property. *See id.* (discussing the various easement violations caused by draining of basins and filling of ditches). The wetland easements involved in *Schoenborn* were nearly identical to pre-1976 easements in *Johansen*. *Compare Schoenborn*, 860 F.2d at 1449 (quoting part of the easement's language), *with supra* note 2 (quoting language from one of the Johansens' easements). The court in *Schoenborn* noted that at trial, the government produced evidence which consisted of aerial photographs at different dates, testimony interpreting the photographs, and testimony of visual observations. *Schoenborn*, 860 F.2d at 1453.

146. *Johansen*, 93 F.3d at 468.

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.* On November 29, 1996, the Eighth Circuit Court of Appeals denied the government's Petition for Rehearing and Suggestion for Rehearing En Banc.

IV. IMPACT

The holding in *United States v. Johansen* has potentially far-reaching legal and practical implications.[153] First, the *Johansen* holding may be contrary to a specific ruling in the Supreme Court decision *North Dakota v. United States*. Second, the decision arguably deals a blow to federal wetland preservation efforts because it effectively imposes upon the federal government another element of proof in wetland easement violation cases. In North Dakota alone, the decision will likely affect the enforcement of approximately 11,000 federal wetland easements.

A. LEGAL IMPLICATIONS—*JOHANSEN* MAY BE CONTRARY TO SUPREME COURT PRECEDENT

The *Johansen* court's "revised interpretation" of the Circuit's prior holding in *Vesterso* may be interpreted to be inconsistent with a specific ruling of the Supreme Court in *North Dakota*. As previously discussed, the *Johansen* court relied heavily on the United States' litigating position in *North Dakota* (in the context of the gubernatorial consent challenge) which maintained that it had acquired easements over only 764,522 wetland acres, a figure based on the acreage figures specified in the Easement Summaries.[154] The *Johansen* court reasoned that the Supreme Court's adoption of that position suggested that wetland acreage "is a set figure and not subject to fluctuation."[155] The argument could be made, however, that the Supreme Court's ruling later in the opinion regarding "after-expanded wetlands" demonstrates that the Court sought to avoid an absolute limit on the amount of wetlands subject to easement restrictions during wet years.[156] For instance, the

153. This case has generated considerable discussion by parties outside the litigation. For instance, *amicus curiae* briefs have been submitted by the State of North Dakota and the National Audubon Society. *See* Amicus Brief of the State of North Dakota, *Johansen* (No. 95-3996ND); Memorandum of Amicus Curiae National Audubon Society in Support of Petition by the United States for Rehearing, *Johansen* (No. 95-3996ND). One commentator recently characterized the impact of the *Johansen* case as follows:

> The decision is being hailed by private property advocates as a hallmark for future litigants who may be prosecuted for their attempts to "contain surplus water to the protected federal wetlands" and who seek the cooperation of the government but whose efforts are halted by the bureaucracy. The *Johansen* decision also should provide a useful precedent to stymie the efforts of government to broaden the scope of tools, such as wetlands easements, to increase regulation over private property. It will be interesting to observe how the government—and other jurisdictions—react to this decision.

Malia Simon Kishore, *Property Owners Score Victory over Wetlands Easements*, NATURAL RESOURCES & ENVIRONMENT, Vol. 11, No. 3, Winter 1997, at 44.

154. *Johansen*, 93 F.3d at 464-65; *see also supra* notes 74-76 and 118-123 (explaining the United States' position, the Supreme Court's adoption of that position, and the *Johansen* court's emphasis on the Court's adoption of that position).

155. *Johansen*, 93 F.3d at 465 n.8.

156. North Dakota v. United States, 460 U.S. 300, 319 (1983); *see supra* notes 78-84 and

Court in *North Dakota* stated that in order to respond to the "inherently fluctuating nature of wetlands," the FWS had been given Congressional authorization to negotiate wetland easements which included restrictions on "after-expanded wetlands."[157] Thus, the Court ruled that the North Dakota statute was hostile to federal law, to the extent that the statute authorized drainage of "after-expanded wetlands" contrary to express terms of previously conveyed easement agreements.[158] It could be argued, therefore, that this ruling should also apply to the easements involved in this case, where the easement language included restrictions on all "natural and reoccurring wetlands" within the entire parcel.[159] By imposing an acreage limitation based on the information in the Easement Summaries, the *Johansen* court granted relief which the Supreme Court arguably denied to the State in *North Dakota*.[160]

accompanying text (discussing the ruling that the United States may impose easement restrictions on wetlands outside the bounds of the easement itself).

157. *North Dakota*, 460 U.S. at 319.

158. *Id.* It is important to note that the Supreme Court's ruling concerned the North Dakota statute and its relation to standard *post-1976* easement agreements. *See id.* at 317 (referring to "[t]he United States' standard easement agreement [which] contains a clause prohibiting the draining of after-expanded wetlands, see n.6, *supra*, and § 20.1-02-18.2(2) which might be read to void such clauses"). The easement the Supreme Court referred to in footnote 6 of its opinion is a post-1976 easement.

159. *See supra* note 2 (quoting language from one of the Johansens' easements). The major flaw, however, in this argument is that the easement under discussion was a post-1976 easement, in which the landowner negotiated and conveyed an easement covering specific wetlands and any after-expansion of those wetlands. Therefore, this argument might be misplaced for two reasons. First, the Supreme Court's "after-expansion" language arguably refers only to wetlands delineated on a map, attached to and recorded with each post-1976 easement. Second, the "after-expansion" language does not apply to any wetlands that develop after conveyance and were not included in the accompanying map (that is, those wetlands developing during periods of extreme moisture).

160. In addition to being contrary to Supreme Court precedent, the United States also argued in its petition for rehearing that the holding in *Johansen* conflicts with the Eighth Circuit precedent; specifically, the Circuit's prior decision in *United States v. Vesterso*, 828 F.2d 1234 (8th Cir. 1987). Petition for Rehearing *En Banc* at 8-9, *Johansen*, (No. 95-3996ND); *see also supra* note 139 and accompanying text (comparing the holdings of the two decisions). Although the *Johansen* court characterizes its holding as a "revised interpretation" of its prior law, *Johansen*, 93 F.3d at 467, this revision arguably adds another element to the federal government's burden of proof, thus effecting a substantial change in prior Eighth Circuit law. *See supra* notes 143-47 and accompanying text (discussing the added element to the government's burden of proof). The court in *Johansen* did offer an explanation for the inconsistency between its holding and prior Eighth Circuit precedent. *Johansen*, 93 F.3d at 464. That is, the court reasoned that the Supreme Court decision in *North Dakota* rejected prior Eighth Circuit precedent which interpreted the easements to encumber all wetlands on a parcel. *Id.*; *see also supra* notes 105-108 (listing and explaining the Eighth Circuit cases that the *Johansen* court claims were rejected by *North Dakota*). The United States argued, however, that the *Johansen* court failed to acknowledge that the Circuit's decision in *Vesterso* came four years after the decision in *North Dakota*. Moreover, the court disregarded the fact that *Vesterso* cited to *North Dakota* to support its conclusion regarding the federal government's burden of proof in wetland violation cases. *Vesterso*, 828 F.2d at 1242 (citing to *North Dakota*, 460 U.S. at 315). In fact, the *Vesterso* court had relied on *United States v. Welte* in establishing the government's burden of proof, *Vesterso*, 828 F.2d at 1242 (citing to United States v. Welte, 635 F. Supp. 388, 389-90 (D. N.D. 1982)), which *Johansen* says the Supreme Court rejected. *Johansen*, 93 F.3d at 464 (stating that the "interpretation given the easements by this court in the early 1980s was rejected by the Supreme Court."). The court in *Johansen* did not address this argument by the United States.

B. PRACTICAL IMPLICATIONS—PROBLEMS WITH PROOF

Legal issues aside, the holding in *Johansen,* adopting a narrower interpretation of certain federal wetland easements, deals a blow to federal waterfowl preservation efforts by reducing the effective scope of the easements. In addition to narrowing the scope of the easements, the holding also makes enforcement of the easements more difficult, and perhaps impossible. Whereas *Vesterso* established that the government must prove that "identifiable" wetlands were damaged,[161] the *Johansen* court added another element of proof;[162] so that now the government must also prove that the wetlands drained were "identifiable, covered wetlands (as existing at the time of the easement's conveyance and described in the Easement Summary)."[163] The *Johansen* court's requirement that the damaged wetlands be those existing at the time of conveyance, and as described in the Easement Summary, presents a problem for pre-1976 easements. Nowhere in the administrative Easement Summaries are there descriptions delineating which wetlands are meant to be covered or where they are located,[164] as the Easement Summaries contain a description of size only.[165] As a result, the United States, armed only with the knowledge as to the number of wetland acres purchased, will apparently have difficulty determining exactly what particular wetlands were intended to be covered by the easement. That is, given the nature of prairie region wetlands,[166] it may be difficult, if not impossible, for the United States to establish which wetlands were intended to be covered by an easement, and the extent to which they are covered.[167] The United States maintains that the Easement Summaries

161. *Vesterso,* 828 F.2d at 1242.

162. *Johansen,* 93 F.3d at 467-68; *see also supra* notes 133-34 and accompanying text (explaining how the *Johansen* court apparently added another element to be proven by the United States in a wetlands violation case).

163. *Johansen,* 93 F.3d at 467 (parentheses in original).

164. *See* Sagsveen, *supra* note 9, at 686 (describing how failure of the FWS to describe the size and location of all wetlands subject to wetland easements may jeopardize the integrity of the easements).

165. *Johansen,* 93 F.3d at 462. In *Johansen,* the court summarized the information that was contained in the Easement Summaries. The court stated the information "includ[ed] the tract description, the tract acreage, the wetland acreage, and the cost of wetland per acre." *Id.* The "wetland acreage" is described only in terms of number of acres. *Id.*

166. *See* North Dakota v. United States, 460 U.S. 300, 304 n.4 (1983) (explaining the glacial history and nature of the prairie region wetlands); *see also supra* note 99 (explaining that because prairie wetlands are continually in a state of transition, formulating a definition of a "wetland" is difficult).

167. Appellee's Petition for Rehearing *En Banc* at 7, *Johansen* (No. 95-3996ND). The United States argued how difficult it would be to prove precisely which wetlands were intended to be covered by a particular easement, and the extent to which each wetland was to be covered. *Id.* The United States stated:

> The [court's] opinion is ambiguous. It uses the term "summary acreage" to mean the wetland acres covered by the easements, and seems to imply that this land is described in

may be unobtainable for some parcels of land,[168] which, under the *Johansen* ruling, would make enforcement of the easements impossible. Furthermore, wetland acreage estimates were generally not made from ground inspections, but rather from reviewing aerial photographs, sometimes taken years before acquisition.[169] Often the acreage calculations were merely an estimate of average wetland acreage per square mile for the area.[170] Moreover, pre-1976 federal wetland easements did not contain maps locating the wetlands subject to the easements.[171] Therefore, requiring the government to determine the size of the *identifiable* and *covered* wetlands will arguably make the enforcement of these federal wetlands easements nearly impossible.[172]

As it stands, the holding in *Johansen* has both practical and legal implications. As discussed, the federal government's ability to enforce several thousand wetland easements in the future is severely impaired. In addition to its practical problems, *Johansen* may also stand on unstable legal ground, as the narrow interpretation of federal wetland easements may run counter to a specific ruling by the United States Supreme Court. Thus, it seems that given both the practical and legal effects of this case, the impact of the *Johansen* decision will be felt for quite some time.

Paul D. Odegaard[173]

---

the wetlands summaries. Those summaries, however, state only an estimated amount of wetlands covered by the easement, and do not indicate the location of those wetlands.

Id. at 7 n.8.

168. Interview with Crooks, *supra* note 129.

169. *Id.*

170. *Id.*

171. *Id.*; *see also* Sagsveen, *supra* note 9, at 686 (explaining that the prior to 1976 the FWS failed to describe the size and location of all wetlands subject to wetland easements).

172. *Id.*

173. I would like to dedicate this article to two men who have been very influential in my life — my grandfathers, Clifford Odegaard and the late Alfred Hulse, both life long farmers near Westhope, N.D., and who because of them I was able to take interest in and appreciate the inherent dilemma in this case — that there is a delicate balance between environmental conservation and a farmer's right to make a living off the land.